NO. 11-1456

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THOMAS MCBRIDE, WARDEN,

Respondent Below,
Petitioner,

v.

STEVE LEE DILWORTH,

Petitioner Below,
Respondent.

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

Respondent, Steve Lee Dilworth ("Mr. Dilworth"), by and through his undersigned counsel, hereby files this brief in opposition to the State of West Virginia's appeal of the Gilmer County Circuit Court's decision to grant habeas corpus relief to Mr. Dilworth, and for reasons, states:

STATEMENT OF CASE

This dispute arises from a criminal case in which Mr. Dilworth was charged and later convicted in connection with the sexual abuse of his stepdaughter, D.H. In particular, on January 31, 2007, after a two-day jury trial in the Circuit Court of Gilmer County, West Virginia, Mr. Dilworth was convicted on ten (10) counts of Sexual Abuse by a Guardian, in violation of West Virginia Code § 61-8D-5(a). Each of the ten (10) counts was identically worded. All ten (10) counts were completely devoid of any factual information differentiating one (1) count from another.

On April 19, 2007, the final Sentencing Order was filed by the Circuit Clerk of Gilmer County. Mr. Dilworth was sentenced to confinement in the state penitentiary for not less than ten (10) years nor more than twenty (20) years on each of the ten (10) identical counts alleging violation of West Virginia Code §61-8D-5(a). The sentenced imposed for counts one (1), two (2), and three (3) were ordered to run consecutively, while the sentences for counts four (4) through ten (10) were ordered to run concurrently. The court suspended the sentences imposed for counts three (3) through ten (10).

On August 22, 2007, Mr. Dilworth, through counsel, filed a Petition for Appeal to this Court. One of the issues raised in the Petition for Appeal was his right to a unanimous jury verdict (which he argued was compromised due to the identical wording of the ten (10) counts of

the indictment for which he was ultimately convicted). This Court refused to review Mr. Dilworth's Petition.

On November 12, 2008, Mr. Dilworth, through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254 in the federal court claiming six (6) separate grounds for relief. Following several months of Motions practice, United States Magistrate Judge, James E. Seibert, of the U.S. District Court of the Northern District for West Virginia issued a Report and Recommendation dated September 2, 2009, recommending that Mr. Dilworth's Petition for Habeas Corpus be GRANTED as to ground four (4) of the Petition, which asserted that Mr. Dilworth was denied his right to a unanimous jury verdict. Accordingly, the Magistrate Judge recommended that Mr. Dilworth's convictions on counts two (2) through ten (10) of his indictment be vacated, leaving in place only the single conviction on count one (1).

Subsequently, on February 12, 2010, Judge Irene M. Keeley of the U.S. District Court for the District of Northern West Virginia issued an Order adopting, in part, and rejecting, in part, the Magistrate Judge's Report and Recommendation. Judge Keeley noted that, Mr. Dilworth's Petition for Appeal to the West Virginia Supreme Court, framed the argument that his indictment was constitutionally insufficient (resulting in the denial of his right to a unanimous jury verdict) in terms of state law, not Federal law. Although the West Virginia Constitution and the Federal Constitution are not materially different on this issue, Judge Keeley found that the federal court could not issue habeas corpus relief until Mr. Dilworth had fully exhausted his claims in the state court. Judge Keeley stayed the federal habeas corpus petition proceeding to provide an opportunity for Mr. Dilworth to present the issues raised to the West Virginia state court.

To that end, on July 20, 2010, Mr. Dilworth filed a Petition for Writ of Habeas Corpus in state court on six (6) grounds, including ground one (1) based on the insufficiency of the indictment, and ground four (4) for denial of a unanimous jury verdict, both of which are interrelated (as will be set forth in more detail below). The Gilmer habeas court agreed with Mr. Dilworth that the indictment was constitutionally insufficient, and vacated all of the convictions in the indictment except for count one (1). The State now appeals the order of the Gilmer County habeas court.

SUMMARY OF ARGUMENT

The state habeas court's findings that the ten (10) count indictment violated Mr. Dilworth's constitutional right to due process given that it failed to provide Mr. Dilworth with proper notice and failed to protect him against double jeopardy was not clearly erroneous. As a preliminary matter, contrary to the assertion of Petitioner, the habeas court found that the indictment in Mr. Dilworth's case was constitutionally deficient on the basis of many factors, not just because it did not contain the specific dates of the abuse. Those factors included (1) that all ten (10) counts of the indictment were identically worded, (2) that the indictment lacked factual information to differentiate one count from another, (3) the indictment lacked any specific details regarding the sexual abuse, and (4) the indictment did not contain the precise information as to how many times the abuse occurred or on which dates.

Additionally, *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005), upon which the habeas court relied in rendering the indictment constitutionally insufficient, is procedurally and factually analogous to the case at bar and, therefore, it was not clearly erroneous for the state habeas court to rely on the principles set forth therein.

Lastly, Mr. Dilworth did not waive his right to challenge the indictment by failing to raise the issue of its sufficiency prior to, or during, trial. According to West Virginia Rules of

Criminal Procedure 12(b)(2), a challenge to an indictment can be raised at any time when, as here, the indictment is so defective that it fails to charge an offense for which the defendant was ultimately convicted.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Respondent, Steve Lee Dilworth, hereby requests an oral argument.

ARGUMENT

1. Pertinent Facts

This case arises from the alleged sexual abuse of D.H. (DOB: 7/9/1998) by Mr. Dilworth. Mr. Dilworth married the mother of D.H. in 1995, thereby making Mr. Dilworth the stepfather of D.H. until the couple divorced. Mr. Dilworth never adopted D.H. during his marriage to Christine. Petitioner's Appendix at 338-339 (hereinafter cited as App.). Mr. Dilworth also never acquired custody rights with respect to D.H.. App. 345-346.

In approximately February 2006, D.H. began acting strangely and ultimately told her boyfriend she had been sexually abused by Mr. Dilworth beginning at age eight (8), some nine (9) years earlier. App. 153, 237. D.H. told her boyfriend the abuse "stopped when I was 13." *Id.* On May 22, 2006, D.H. informed her mother of the allegations, allegedly for the first time. App. 238. For the years prior to these revelations, D.H. appeared "normal" and never exhibited any signs of anxiety around her stepfather. App. 153. On the evening of May 23, 2006, Mrs. Dilworth confronted Mr. Dilworth about the allegations. App. 301. Later that evening, the police were called to the Dilworth residence and the parties, including Mr. Dilworth, Mrs. Dilworth and D.H. were interviewed. On May 24, 2006, Mr. Dilworth was arrested on charges of violation of West Virginia Code §61-8D-5a for Sex Abuse by a Guardian. App. 321-329.

The details regarding the allegations of abuse unfolded as follows: Mr. Dilworth's interview with police, which began in the early morning hours of May 24, 2006, was recorded

using the video equipment installed in the vehicle of a responding West Virginia State trooper, R.P. Smith. At trial, a few pages of notes taken by Trooper Smith during the recorded interview were admitted over defendant's objections as State's Exhibit 1. App. 161-175. In State's Exhibit 1, Mr. Dilworth purportedly stated that "I did touch my daughter years ago" and when asked how old she was at the time, said "around 11 or 10 years old." State's Ex. 1. D.H. turned ten (10) years old on July 9, 1998 and turned eleven (11) years old on July 9, 1999. During his interview, Mr. Dilworth denied ever touching D.H.'s vagina and denied that oral sex ever occurred.

During her interview on May 24, 2006, D.H. could describe only two (2) instances in which Mr. Dilworth touched her while in West Virginia: one (1) in approximately October 1999 and one (1) in approximately November 2000 in the woods. App. 249-255. She denied Mr. Dilworth ever touched her vagina and told Trooper Smith, "I know it stopped when I was 13." App. 250, 256. Six days later, on May 30, 2006, D.H. gave a second statement to Trooper Smith at the police station.[1] App. 258. This time, D.H.'s memory of events improved and she was able to provide specific details and dates to Trooper Smith. App. 218. She described a total of nine incidents in remarkable detail as having occurred at the following times: the first in "October" 1999 (App. 259-260); the second in "November" 1999 (App. 260-261); the third in "December" 1999 (App. 262); the fourth "after Christmas but before the first of the year" in 1999[2] (App. 263-

[1]D.H. testified that her boyfriend drove her to Trooper Smith's office on May 30, 2006 to give this statement and that her mother was not present; however, Trooper Smith testified that D.H.'s mother drove her to the station on May 30, 2006 and waited outside his office while she provided her statement. Compare App. 208, 218-219 with App. 258.

[2]This is the same incident D.H. identified in her first statement on May 24, 2006 as having occurred in the woods in the winter of 2000. App. 264

264); the fifth "before February 14th" 2000[3] (App. 265); the sixth in "May" 2000 (App. 267); the seventh in "August" 2000 (App. 268); the eighth also in "August" 2000 (App. 270-271); and the ninth in "November" 2001 (App. 271-272).

When D.H. was questioned at trial about instances of sexual contact occurring in 2001, the following exchanges occurred at App. 241 and App. 243-244:

Q: Can you say exactly how many times he came in your room in 2001?

A: No I can't.

Q: Would you be able to truthfully tell this jury it was more than once?

A: (Nodded.) Yes.

Q: Was it as many as ten times?

A: (Nodded.) Yes.

Q: Was it at least ten times?

A: Yes. (Crying.)

* * *

Q: Now, I do have to go back before 2001. You've told us about 2001, and if I understand you right, you don't know exactly how many times it happened in 2001?

A: Correct.

Q: Could you estimate how many times?

A: Yes.

Q: Would you do that for the jury, please?

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[3]During her statement on May 30, 2006, D.H. said this incident in early 2000, when she would have been almost 12 years old, "was the first time that he ever placed his mouth on my breasts"; however, in her first statement on May 24, 2006, D.H. said Mr. Dilworth licked her breast when she was 8 years old and still living in Maryland. App. 266

A: At least 20, maybe 30.

Q: In 2001?

A: In 2001.

Ultimately, on January 31, 2007, after a two-day jury trial in the Circuit Court of Gilmer County, West Virginia, Mr. Dilworth was convicted on ten (10) counts of Sexual Abuse by a Guardian, in violation of West Virginia Code § 61-8D-5(a). Each of the ten (10) counts was identically worded and alleged that the abuse occurred during the year 2001. All ten (10) counts completely lacked any factual information differentiating one (1) count from the other. In short, although D.H. alleged that she was abused by Mr. Dilworth "at least 20, maybe 30 times" in 2001, the indictment, containing ten (10) identical counts of Sexual Abuse by a Guardian, was so vague that it is impossible for anyone, including the jury, to know which instances of abuse make up the ten (10) counts.

2. The state habeas court's findings that the indictment violated Mr. Dilworth's constitutional right to due process given that it failed to provide Mr. Dilworth with proper notice and failed to protect him against double jeopardy was not clearly erroneous.

a. Contrary to the assertion of Petitioner, the habeas court found that the indictment in Mr. Dilworth's case was constitutionally deficient on the basis of many factors, not just because it did not contain the specific dates of the abuse.

As a preliminary matter, Petitioner's Brief mischaracterizes the findings set forth in the state habeas court's Order regarding Mr. Dilworth's habeas corpus petition. In its Brief, Petitioner states that "the state habeas court found that *because the indictment in this case did not include the date each offense occurred,* it was a violation of due process and double jeopardy," and the Petitioner maintains that this finding was clearly erroneous. See Petitioner's Brief, p. 3 (emphasis added). However, while the fact that the indictment did not contain specific dates of

the abuse was a factor in the state habeas court's decision regarding the constitutional deficiency of the indictment, it was not the sole basis for the state habeas court's decision regarding same.

In fact, the state habeas court's Order made clear that it found that the indictment was constitutionally deficient on many fronts, including (1) that all ten (10) counts of the indictment were identically worded, (2) that the indictment lacked factual information to differentiate one count from another, (3) the indictment lacked any specific details regarding the sexual abuse, and (4) the indictment did not contain the precise information as to how many times the abuse occurred or on which dates.

In its Order, the state habeas court specifically stated that this case is "very similar" to *Valentine v. Konteh*, 395 F.3d 626 (2005), as the "...Petitioner in this case was *charged with ten (10) identical counts*, occurring over a 12 month period, of sexual abuse by a parent or guardian in violation of West Virginia Code §61-8D-5(a). Further, *no information was provided to differentiate one count from another.*" See App. 516. Thus, it is clear that the state habeas court factored into its decision that Mr. Dilworth was charged with ten (10) identical counts, with no information to differentiate one count from another, when rendering the indictment unconstitutional.

The state habeas court also took care to distinguish *Valentine*, upon which it relied in rendering its decision, from *State v. David D. W.*, 214 W.Va. 167, 588 S.E.2d 156 (2003) upon which the State of West Virginia relies, because not only was *Valentine* decided subsequent to *David D.W.*, but also because *David D.W.* "...*did not address the issue of identical charging language in multiple counts in an indictment, and the effect that may have on an individual's due process rights.*" App. 517 (emphasis added). Thus, the state habeas court clearly factored the identical charging language into its decision, not just the lack of dates as Petitioner contends.

The state habeas court further stated in support of its Order that "the indictment returned against Petitioner on July 6, 2006, *lacks any specific details as to the sexual abuse*." See App. 517 (emphasis added). The lack of specific details as to the sexual abuse was yet another factor considered by the state habeas court in rendering its decision.

In short, based on a plain reading of the Order, it is clear that the state habeas court considered factors other than just the lack of dates of the abuse when finding that the indictment in Mr. Dilworth's case was constitutionally deficient. As will be set forth in more detail below, the factors considered by the state habeas court in rendering Mr. Dilworth's indictment constitutionally defective are grounded in law and, therefore, the decision of the state habeas court regarding same was not clearly erroneous.

3. Despite Petitioner's bald contentions to the contrary, *Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005) is procedurally and factually analogous to the case at bar and, therefore, it was not clearly erroneous for the state habeas court to rely on the principles set forth therein.

Valentine v. Konteh, 395 F.3d 626 (6th Cir. 2005) is procedurally and factually analogous to the case at bar and, therefore, it was not clearly erroneous for the state habeas court to rely on the legal principles set forth therein.

In *Valentine*, the defendant, Michael Valentine, was charged with forty (40) counts of sexual abuse. *Id.* at 628. Like the instant case, the forty (40) offenses were alleged to have occurred over a several month period, specifically, between March 1, 1995 and January 16, 1996. *Id.* at 626. The indictment in *Valentine* was comprised of twenty (20) "carbon copy" counts of Child Rape, each of which was identically worded so that there was no differentiation among the charges and twenty (20) "carbon copy" counts of Felonious Sexual Penetration which, like the counts of Child Rape, were also identically worded. *Id.* at 628.

The case was tried before a jury and, like in Mr. Dilworth's case, the only witness to testify regarding the number of assaults committed was the victim, and she was not able to point to specific or separate incidents of abuse, but instead described typical abusive behavior by Michael Valentine and estimated that the abuse occurred twenty (20) or fifteen (15) times. The jury ultimately returned a verdict convicting Michael Valentine on all forty (40) counts, and Michael Valentine was sentenced to forty (40) consecutive life terms. *Id.* at 629.

The appellate court affirmed the convictions on all twenty (20) counts of Child Rape, but only fifteen (15) of the twenty (20) Sexual Penetration counts. *Id.* Michael Valentine then filed a petition for habeas corpus, contending that his constitutional right to due process was denied when he was tried and convicted on an indictment which did not specify a date *or distinguish between conduct on any given date*. *Id.* at 630 (emphasis added). The United States Court of Appeals, Sixth Circuit granted Michael Valentine's writ for habeas corpus relief, finding that "....the indictment charging Valentine with multiple, identical and undifferentiated counts violated the constitutional requirements imposed by due process." *Id.* at 636. The United States Court of Appeals further stated, "[w]hen prosecutors opt to use such carbon-copy indictments, the defendant neither has adequate notice to defend himself, nor sufficient protection from double jeopardy." *Id.* at 636.

In reaching this decision, the United States Court of Appeals properly recognized that the United States Supreme Court set forth the criteria by which sufficiency of all criminal indictments, both federal and state, must be measured in *Russell v. United States*, 369 U.S. 749 (1982). Under *Russell*, a criminal indictment is sufficient only if it: (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *Valentine*, 395 F.3d at 631 (quoting *Russell v. United States*,

369 U.S. 749 (1982)). Applying these criteria to Michael Valentine's indictment, the United States Court of Appeals held that "[w]hile the indictment in this case did comply with the first prong of *Russell* by adequately setting out the elements of the charged offense, the multiple, undifferentiated charges in the indictment violated Valentine's rights to notice and his right to be protected from double jeopardy." *Id.* at 631.

With regard to the violation of Michael Valentine's right to notice, the Court stated that the "...the problem is that within each set of 20 counts, there are absolutely no distinctions made," and "the criminal counts were not connected to distinguishable incidents." *Id.* at 631. The Court ultimately held that "[a]s the forty criminal counts were not anchored to forty distinguishable criminal offenses, Valentine had little ability to defend himself." *Id.* at 633. The Court further stated that, "[w]hile Valentine had legal and actual notice that he must defend against the child's allegations of sexual abuse over a ten-month period, he was given no notice of the multiple incidents for which he was tried and convicted." *Id.* at 634.

Like in *Valentine*, the ten (10) counts brought against Mr. Dilworth for Sexual Abuse by a Parent or Guardian under West Virginia Code §61-8D-5a were identical, "carbon copies" of each other, with no distinctions such as the dates of the abuse, the location of the abuse, the specific type of sexual abuse, or any other information to differentiate one count from another. Each of the ten counts (10) of the indictment were identical and provided as follows:

> That on or about the_____day of _____, 2001, in Gilmer County, West Virginia, STEVE LEE DILWORTH committed the felony offense of SEXUAL ABUSE BY A PARENT OR GUARDIAN in that he, the said STEVE LEE DILWORTH, did then and there willfully, intentionally, unlawfully, knowingly, and feloniously engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with a child under his care, custody or control, and that he was then the parent or guardian of the said child, to wit: STEVE LEE DILWORTH did, on or about the _____ day of _____, 2001, in Gilmer County, West Virginia, willfully, intentionally, unlawfully, knowingly, and feloniously engage in or attempt to engage in

sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, D.H., a child under his care, custody, or control, and he was then the guardian of the said D.H., against the peace and dignity of the State of West Virginia in violation of West Virginia Code § 61-8D-5(a).

Thus, like the Court in found in *Valentine*, although Mr. Dilworth may have had legal and actual notice that he must defend against the child's allegations of sexual abuse over a twelve-month period, he was given no notice of the multiple incidents for which he was tried and convicted.

With regard to the violation of double jeopardy, the United States Court of Appeals in *Valentine* explained two important double jeopardy problems, both of which are present in Mr. Dilworth's case: (1) insufficient specificity in the indictment to enable the defendant to plead his conviction or acquittals as a bar to future prosecutions and (2) undifferentiated counts introduce the very real possibility that a defendant would be subject to double jeopardy in his initial trial by being punished multiple times for what may have been the same offense. *Id.* at 634-35.

As to the ability of the defendant to plead his guilty verdict as a bar to future prosecutions, the United States Court of Appeals stated, "[w]e cannot be sure what double jeopardy would prohibit because we cannot be sure what factual incidents were presented and decided by this jury." *Id.* at 635. Similarly, in the Mr. Dilworth's case, it is simply not possible to determine from the indictment and the trial record what double jeopardy would prohibit because it is impossible to determine what factual incidents were presented to and decided by this jury. *Valentine*, 395 F.3d at 635 (discussing Russell, 369 U.S. at 764).

Additionally, as set forth in *Valentine*, the undifferentiated counts introduced the real possibility that Mr. Dilworth has already been subjected to double jeopardy by being punished multiple times for what may have been the same offense. *Valentine*, 395 F.3d at 634-35. Mr. Dilworth was sentenced to confinement in the state penitentiary for not less than ten (10) years,

nor more than twenty (20) years on each of the ten (10) counts alleging violations of West Virginia Code §61-8D-5(a). The sentences imposed for counts one, two and three were ordered to run consecutively, while the sentences for counts four through ten were ordered to run concurrently. The sentences imposed for counts three through ten were suspended. On this record, it is impossible to exclude the possibility that Mr. Dilworth has been punished multiple times for the same offense.

4. ***State v. David D.W.*, 214 W. Va. 167, 588 S.E.2d 156 (2003), upon which the State of West Virginia Relies in Support of its Appeal is readily distinguishable from the case at bar and simply does not address all of the issues that are present in the instant case.**

In its brief, the State of West Virginia maintains that *David D.W.* should be controlling. However, the issue presented in *David D.W.* is readily distinguishable from the issues present in the case at bar. Put simply, *David D.W.* did not address the issue of identical charging language in multiple counts of an indictment and/or the failure to include specific factual information to differentiate the charges from one another.

In *David D.W.*, the defendant was charged with thirty eight (38) counts of Incest; thirty eight (38) counts of First Degree Sexual Assault; thirty eight (38) counts of Sexual Abuse by a Parent; and thirty eight (38) counts of First Degree Sexual Abuse. *Id.* at 159. Defendant was tried by a jury and sentenced to 1,140 to 2,660 years for his convictions. *Id.* Defendant appealed, raising among other issues, the insufficiency of the indictment. *Id.* As to the insufficiency of the indictment, Defendant took issue only with "the lack of specificity concerning when the alleged offenses occurred," and claimed that "it would be impossible for him to plead his convictions in the case as a bar to a later prosecution, since the State could draft a new indictment alleging the same offenses occurred on one of the days of the month not alleged in the previous indictment." *Id.* at 162. This Court rejected this contention, but only on

the narrow basis that "...there was no requirement that the indictment in this case specify exactly when the alleged offenses occurred." This Court did not address the other issues presented here, including identical wording of each of the counts, lack of specificity with respect to the location of the sexual abuse, and/or lack of details as to the specific types of abuse.

In rendering its decision, the state habeas court in the instant case specifically stated that, although it considered *David D.W.*, it did not find it controlling, noting that *Valentine* was decided subsequent to *David D.W* (see App. 517) and stating "...a further review of *David D. W.* reveals that the West Virginia Supreme Court of Appeals did not address the issue of identical charging language in multiple counts of an indictment, and the effect that may have on an individual's constitutional due process rights; and as such, this issue was not raised for consideration by the West Virginia Supreme Court of Appeals." See App. 517.

5. Petitioner Did not Waive His Claim Regarding Insufficiency of Indictment.

In its Brief, the State of West Virginia contends that Mr. Dilworth waived his claim regarding the insufficiency of the indictment because he failed to challenge the indictment prior to trial. In support of this contention, the State of West Virginia cites Rule 12(b). Rule 12(b) provides, in pertinent part:

> Pretrial Motions – Any defense, objection or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> (2) Defenses and objections based on defects in the indictment or information *(other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).*

Thus, contrary to the State's assertions, failure to object to the indictment prior to trial is not an absolute bar to review of the sufficiency of the indictment by the appellate court.[4] Here, even assuming Mr. Dilworth failed to object to the indictment prior to trial, the indictment is fatally defective (and subject to review at any time) because no one – not Mr. Dilworth, not his counsel, not the jury – has any idea of whether the indictment "charged [the] offense[s]" for which Mr. Dilworth was ultimately convicted as the ten (10) counts of the indictment were "carbon copies" of each other, and completely lacked any factual information related to the type of sexual abuse, the location of the sexual abuse, the time/date of the sexual abuse, or any other information related to the specific offense.

In support of its contention that Mr. Dilworth has waived his right to challenge the indictment, the State of West Virginia also cites to *State v. Miller,* 476 S.E.2d 535 (1996). In *Miller,* the defendant shot and killed a man outside of a bar, and was convicted of first degree murder. *Id.* at 540. On appeal, defendant/appellant's main contention was the sufficiency of the indictment. *Id.* at 543. The defendant/appellant asserted that, because the indictment excluded the word "premeditation,"[5] it did not contain the necessary elements of first degree murder on its face and, therefore, the use of the indictment constitutes plain error. *Id.* Defendant/appellant did not raise this issue at trial. *Id.* at 54.

This Court determined that appellate consideration of an error arising from an indictment, which was not objected to prior to trial, is limited by Rule 12(b)(2) of the West Virginia Rules of Criminal Procedure. *Id.* at 545. However, it recognized that failure to object to the indictment prior to trial is not an absolute waiver of the issue. The court explained as follows:

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[4] Mr. Dilworth did file a formal written motion to dismiss at the end of the Government's case during trial on the basis that the indictment was insufficient.

[5] The indictment did contain the word "deliberation."

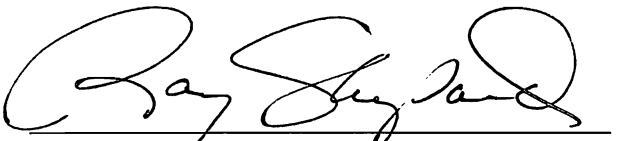
> Although *a challenge to a defective indictment is never waived*, we literally will construe an indictment in favor of validity where a defendant fails timely to challenge its sufficiency. Without objection, the indictment should be upheld *unless it is so defective that it does not...charge an offense under West Virginia law or the specific offense for which the defendant was convicted.*

Id. (emphasis added). In addressing the defendant/appellant's contention that the indictment was insufficient in that it failed to include the word "premeditation," this Court determined that "...the failure of the trial court to dismiss the indictment as defective was not error at all." *Id.* at 545-46. This Court explained that the defendant's only complaint is that the word "premeditation" is missing from the indictment. *Id.* at 547. Defendant asserted that both "deliberation and premeditation" are separate, but necessary elements of first degree murder and each must be specifically alleged in the indictment. *Id.* This Court found that the terms "deliberate" and "premeditate" are synonymous under West Virginia law and, as such, this Court found the indictment to be clearly sufficient. *Id.*

Compared with the case at bar, *Miller* is clearly distinguishable. In *Miller,* only one count was charged in the indictment, and the charged offense was one that the defendant could clearly be convicted of. *Miller,* 476 S.E.2d at 545-46. In the present case, all ten counts are completely identical. They are not just missing one word, *i.e.* "premeditation." Rather, they are missing basic factual information, such as date, location, and type of abuse, such that it is not possible to differentiate one count from another. Accordingly, this is exactly the type of situation contemplated by the *Miller* court wherein the indictment is so defective that it does not charge a specific offense for which the defendant was ultimately convicted and, therefore, a challenge to its sufficiency can be raised at any time.

CONCLUSION

For the foregoing reasons, this Court should affirm the findings of the habeas court.



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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of April, 2012, I have served a true copy of the foregoing Brief of Respondent upon Counsel for Respondent by depositing it with the United States Post Office, first class mail, postage prepaid addressed as follows:

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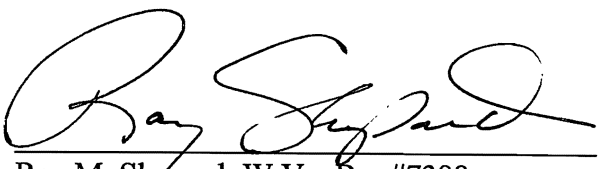

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